

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
EUREKA DIVISION

GEORGE A. BJURBERG,  
Plaintiff,

v.

SEAN KELLIE, et. al.,  
Defendants.

No. C 13-5500 NJV (PR)

**ORDER OF DISMISSAL WITH  
LEAVE TO AMEND**

Plaintiff has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual

1 allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'  
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
3 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
4 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
5 (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is  
6 plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained  
7 the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the  
8 framework of a complaint, they must be supported by factual allegations. When there are  
9 well-pleaded factual allegations, a court should assume their veracity and then determine  
10 whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662,  
11 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
13 elements: (1) that a right secured by the Constitution or laws of the United States was  
14 violated, and (2) that the alleged deprivation was committed by a person acting under the  
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

#### 16 **B. Legal Claims**

17 Plaintiff alleges that jail staff used excessive force against him. It is not clear if  
18 plaintiff is a convicted prisoner or a pretrial detainee.

19 When a pretrial detainee challenges conditions of his confinement, the proper inquiry  
20 is whether the conditions amount to punishment in violation of the Due Process Clause of  
21 the Fourteenth Amendment. See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). The Due  
22 Process Clause protects a post-arraignment pretrial detainee from the use of excessive  
23 force that amounts to punishment. See *Graham v. Conner*, 490 U.S. 386, 395 n. 10 (1989)  
24 (citing *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979)); see also *Gibson v. County of*  
25 *Washoe, Nev.*, 290 F.3d 1175, 1197 (9th Cir. 2002). The Ninth Circuit has stated the  
26 factors a court should consider in resolving a due process claim alleging excessive force.  
27 *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990). These factors are (1) the need for the  
28

1 application of force, (2) the relationship between the need and the amount of force that was  
2 used, (3) the extent of the injury inflicted, and (4) whether force was applied in a good faith  
3 effort to maintain and restore discipline. *Id.*

4 The treatment a prisoner receives in prison and the conditions under which he is  
5 confined are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509  
6 U.S. 25, 31 (1993). "After incarceration, only the unnecessary and wanton infliction of pain  
7 . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."  
8 *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (ellipsis in original) (internal quotation and  
9 citation omitted). The core judicial inquiry is whether force was applied in a good-faith effort  
10 to maintain or restore discipline, or maliciously and sadistically to cause harm. *Whitley*, 475  
11 U.S. at 320-21.

12 Plaintiff states that he was in his cell when Defendants Kellie and Loschiavo  
13 assaulted him for no reason and he had to be treated at a hospital. While named as a  
14 Defendant there are no allegations against Hanlon. The complaint will be dismissed with  
15 leave to amend to provide more information regarding Hanlon and for Plaintiff to state if he  
16 is a pretrial detainee or convicted prisoner. Plaintiff should also provide additional details  
17 regarding the assault and the injuries he suffered.

### 18 CONCLUSION

19 1. The complaint is **DISMISSED** with leave to amend in accordance with the  
20 standards set forth above. The amended complaint must be filed within **twenty-eight (28)**  
21 **days** of the date this order is filed and must include the caption and civil case number used  
22 in this order and the words AMENDED COMPLAINT on the first page. Because an  
23 amended complaint completely replaces the original complaint, plaintiff must include in it all  
24 the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.  
25 1992). He may not incorporate material from the original complaint by reference. Failure to  
26 amend within the designated time will result in the dismissal of this action.

27 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
28

1 court informed of any change of address by filing a separate paper with the clerk headed  
2 "Notice of Change of Address," and must comply with the court's orders in a timely fashion.  
3 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to  
4 Federal Rule of Civil Procedure 41(b).

5 **IT IS SO ORDERED.**

6 Dated: January 22, 2014.

7   
NANDOR J. VADAS  
United States Magistrate Judge

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No. 1:13-CV-5500 NJV

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on January 22, 2014, I SERVED a true and correct copy of the attached by placing said copy in a postage paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail.

George A. Bjurberg  
1136813  
McGuire Correctional Facility  
300 Bradford Street  
Redwood City, CA 94063-1530

*/s/ Linn Van Meter*

Linn Van Meter  
Administrative Law Clerk to  
the Honorable Nandor J. Vadas